Supreme Court U.S.
FILED
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No. 02-882

IN THE

Supreme Court of the United States

ADVANTA CORP. AND
ADVANTA MORTGAGE CORPORATION, U.S.A.,
Petitioners,

v.

MILTON RISEMAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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January 3, 2003

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QUESTION PRESENTED

Whether the court of appeals properly applied the settled rule that an appellate reduction of a jury's verdict should be to the highest amount supported by the evidence to a state law claim for damages.

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STATEMENT OF THE CASE

This case does not remotely present the conflicts or constitutional errors that petitioners assert. Instead, in an unpublished disposition, the Third Circuit merely applied well settled legal principles to a particular set of facts in a case arising in relevant part solely under state law. Respondent Milton Riseman ("Riseman") regrets the need for even a somewhat lengthy opposition in such a case. In light of the misstatements and convoluted description of the governing law set forth in the petition, however, respondent believes that an accurate statement of the facts and issues would be of benefit to this Court.

The petition filed by Advanta Corporation and its subsidiary ("Advanta" or "the Company") is the latest chapter in petitioners' efforts to impeach a jury verdict in which the jury concluded not only that petitioners committed willful violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, Pet. App. 47a-48a, but that petitioners' additional withholding of wages owed to Riseman was done in bad faith in violation of state law, *id.* at 48a.

In 1992, Advanta hired Riseman from Citibank. Pet. App. 13a. Soon thereafter, in 1994, he was promoted to become President and Chief Executive Officer of Advanta Mortgage Corporation, USA ("Advanta Mortgage"), the Company's multi-billion dollar mortgage subsidiary. See *id.* "From 1992 to 1997, Riseman's performance was well received, and he was credited with having saved, turned around, and built the mortgage unit." *Id.* at 13a-14a (opinion of the district court). Indeed, under his leadership, Advanta Mortgage achieved exponential growth, became highly profitable and by 1998, it

"account[ed] for 85% of the entire corporation's revenues, assets and profits." *Id.* at 14a.[1]

During 1997, while the Company was exploring strategic alternatives, including the possible sale of all or part of its business, it offered key executives a bonus opportunity that would be triggered by a "'change in control'" affecting the executive's group. See Pet. App. 14a. In the event of such a change in control, Advanta would pay Riseman 200% of his base salary as a bonus (the "1997 bonus"), an amount totaling $650,000. See *id.* When, later that year, Advanta entered into an agreement with Fleet Financial Group, it paid the change in control bonus to 67 employees, but not to Riseman. See *id.* at 15a. Separately, Advanta extended Riseman another bonus opportunity in March 1998 (the "1998 bonus"). By its terms,[2] Riseman would receive a bonus payment in the amount of $400,000 on March 31, 1999. See *id.* Finally, on a yearly basis, Advanta awarded to Riseman and others what it called "Advanta Management Incentive Program," or "AMIP," bonuses.

In 1997, Riseman sought a promotion to the vacant position of President of the parent corporation. The Company chose to fill the position not with the 61 year-old Riseman, but instead with a 35 year-old executive from another company who had no financial industry experience. Later, in August of 1998, the three top executives of Advanta informed Riseman that he was being replaced as President and CEO of Advanta Mortgage by an inexperienced executive 20 years his junior, and that they had created a new position for Riseman – "Chairman" of the mortgage subsidiary. See Pet. App. 15a. Riseman accepted that position. See *id.*

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[1] Riseman received a starting salary in 1992 of $200,000 per year. By 1998, he received a salary of $385,000 per year. Pet. App. 2a n.1.

[2] Specifically, to receive the bonus, Riseman had to (1) exercise "'flexibility and cooperation'"; (2) keep the arrangement "'confidential'"; and (3) be there "'at the time.'" Pet. App. 15a.

Almost immediately, Riseman became concerned that the position to which he had moved was not a "real" job. Thus, on August 17, 1998, Riseman's counsel sent a letter to Advanta, charging possible age discrimination. See Pet. App. 16a. The next day, Advanta's counsel responded with a letter explicitly advising Riseman that he remained an employee of Advanta. That same day, however, the Company's Vice Chairman informed Riseman to "'go home'" and not to report to work again. *Id.* Advanta soon thereafter informed its employees that Riseman had resigned; two months later, the Company sent Riseman a letter stating that he was being taken off the payroll. The Company never paid Riseman the 1997 bonus, the 1998 bonus, or his 1998 AMIP bonus. See *id.*

Riseman thereafter filed a complaint in the United States District Court for the Eastern District of Pennsylvania alleging, among other things, age discrimination and retaliation in violation of the ADEA, breach of contract, detrimental reliance, and violations of the Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 Pa. Cons. Stat. § 260.1 *et seq.* See Pet. App. 17a. Riseman's WPCL claims centered on Advanta's withholding of the 1997 bonus, the 1998 bonus, and the 1998 AMIP bonus. At trial, "while insisting that the jury should receive instructions on the parameters of the 1997 and 1998 bonuses, Advanta did not seek an instruction regarding any damages ceiling on the AMIP bonus." *Id.* at 28a.[3]

After a three-week trial, a jury found in favor of Riseman and against Advanta on several counts. Specifically, the jury found that petitioners violated the anti-retaliation provision of

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[3] At trial, Riseman argued that the 1998 AMIP bonus was for an unliquidated amount, which should be established in reference to bonuses received during 1998 by other Advanta executives, many of which amounted to several million dollars. Advanta did not raise any objection to this contention and it never argued to the jury that there was a monetary limit to the 1998 AMIP bonus.

the ADEA; that said violation was willful; that petitioners breached Riseman's employment contract; that petitioners were liable to Riseman for detrimental reliance; that petitioners violated the WPCL by withholding Riseman's bonuses; and that petitioners' violation of the WPCL lacked any good faith basis. See Pet. App. 47a-48a. The jury accordingly awarded Riseman (1) $1,377,125 in back pay under the ADEA and (2) $2,562,001 under the WPCL for the improperly withheld bonuses owed to him. See *id.* at 49a.

After the jury returned its verdict, Advanta moved for judgment as a matter of law and for partial new trial. In a lengthy unpublished opinion, the district court denied Advanta's motion (as well as a motion brought by Riseman) and entered judgment in favor of Riseman for $6,071,783.25. The judgment amount included statutory enhancements for liquidated damages under the ADEA and the WPCL as well as prejudgment interest on the back pay award. See Pet. App. 4a, 13a-45a.

In an unpublished decision, a unanimous court of appeals affirmed in part and reversed in part. See Pet. App. 2a. The court of appeals affirmed the jury's finding of unlawful retaliation under the ADEA and upheld the amount of back pay awarded by the jury. See *id.* at 4a. In doing so, it noted that the ADEA back pay award was justified without including any of the bonuses sought by Riseman in his complaint. See *id.* at 6a n.3. Next, the lower court rejected Advanta's claim that it should have been awarded judgment as a matter of law on Riseman's WPCL claim, holding: "[u]pon careful review of the record, we conclude that the jury was entitled to believe that Riseman satisfied all of the conditions necessary to receive each of the three bonuses, and also that *Advanta itself* believed that Riseman satisfied all of the conditions to receive the three bonuses." *Id.* at 7a; see also *id.* ("Indeed, this conclusion is consistent with the jury's specific finding that Advanta 'had no good faith basis' to deny Riseman the bonuses he sought under the WPCL.").

The court of appeals did, however, find merit in Advanta's contention that the 1998 AMIP bonus was "capped" at a level equal to Mr. Riseman's 1998 salary, or $385,000.00. It therefore reduced the WPCL damages award accordingly:

> Because Riseman's WPCL Claim consisted only of the 1998 Retention Bonus ($400,000), the 1997 Change of Control Bonus ($650,000) and the 1998 AMIP Bonus (limited to $385,000), the maximum damage award the jury could have provided under the WPCL was $1,435,000. . . .
>
> Accordingly, we will reduce the jury's $2.562 million WPCL award to $1,435,000. Because we are persuaded by the record that the jury verdict included all three bonuses in awarding the original $2.562 million WPCL award, we reject Advanta's contention that the jury's error requires a remand for a new trial with regard to the three bonuses under the WPCL.

Pet. App. 9a. The court of appeals remanded with instructions that the district court recalculate the WPCL liquidated damages. See *id.* at 12a.

REASONS FOR DENYING THE PETITION

Advanta now condemns the Third Circuit for giving it precisely what it requested. In doing so, Advanta attacks a limited portion of the jury's award,[4] and requests that this Court summarily reverse the decision of the Third Circuit or, in the alternative, grant certiorari. Advanta's arguments are without merit.

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[4] The Third Circuit flatly rejected the argument that any error in calculation regarding Riseman's bonuses requires a new trial on the retaliation claim, "because there is no overlap between the WPCL and the ADEA damage awards." Pet. App. at 9a; *id.* at 6a n.3 ("[W]e reject Advanta's contention that there was double-counting between the jury's ADEA award and its WPCL award."). Petitioners do not challenge this aspect of the Third Circuit's decision.

The questions presented in the petition are not remotely worthy of this Court's review. Petitioners present no conflict of federal authority that is relevant to this case. Instead, petitioners ask this Court to review summarily an unpublished decision of the Third Circuit and apply settled legal principles to a particular set of facts underlying the state law claims advanced by respondent below. Not only was the Third Circuit's ruling demonstrably correct, moreover, as is made evident by the petition itself, this case involves an inherently factbound question of no importance to anyone except the parties to the proceedings below.

1. The court of appeals' unremarkable application of settled law to the facts of this case does not warrant this Court's attention. Petitioners are really asking this Court to adopt the extraordinary and wholly unprecedented position that anytime a jury verdict is found to exceed the maximum amount of damages supported by the record or available under law, a new trial must automatically follow. In contrast to the assertions of petitioners, such an outcome is directly at odds with the Seventh Amendment. This Court has long emphasized that a degree of deference is ordinarily afforded to the jury's conclusions. See, *e.g.*, *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 424 (1994). It is for this reason that the courts of appeals, in keeping with this Court's decisions, *uniformly* apply the legal principle applied by the Third Circuit in this case – namely, appellate reduction of a jury's verdict to "the highest reasonable total of damages for which there is adequate evidentiary support in th[e] case" – is fully consistent with the Seventh Amendment. *Marchant* v. *Dayton Tire & Rubber Co.*, 836 F.2d 695, 704 (1st Cir. 1988) (applying the "maximum recovery rule"); see 11 Charles Alan Wright et al., *Federal Practice & Procedure* § 2815, at 167-68 (2d ed. 1995 & 2002 Supp.) ("Wright & Miller"). Further, in such circumstances, "the defendant [is] not in any way . . . prejudiced." *Marchant*, 836 F.2d at 704; Wright & Miller § 2815, at 167 ("[T]he jury by its excessive verdict intended

to award the maximum and defendant cannot complain of any judgment within the permissible limits."). Accordingly, the petition's broadest claim offers nothing worthy of this Court's review.

2. Petitioners rather weakly attempt to identify a conflict between the court of appeals' decision and decisions of other lower courts. The claim has no merit. Indeed, the two principal circuit decisions relied upon by petitioners highlight the illusory nature of their asserted conflict. *Jamison Co.* v. *Westvaco Corp.*, 526 F.2d 922 (5th Cir. 1976), on which they rely, presented circumstances in which the court of appeals reviewing the trial record was entirely unable to "calculate the maximum recovery on which to base the remittitur." *Id.* at 935. That is, the court could not ascertain the maximum possible amount to which the plaintiff might be entitled in light of the evidence. Here, by contrast, calculating that amount was straightforward. As the Third Circuit explained, the record was replete with evidence supporting the conclusion that Riseman was entitled to the three bonuses at issue. Pet. App. 7a. Even more striking, the lower court noted that the evidence demonstrated further that "*Advanta itself* believed that Riseman satisfied all of the conditions to receive the three bonuses." *Id.* Calculating the "maximum recovery" supported by the evidence in this case, therefore, required no speculation by the court of appeals. It merely reduced the WPCL award to the amount that properly respected the $385,000 "cap" on Riseman's 1998 AMIP bonus.

Petitioners reliance on *Shu-Tao Lin* v. *McDonnell Douglas Corp.*, 742 F.2d 45 (2d Cir. 1984), is equally misguided. The *Lin* court found itself in a situation in which "it [wa]s impossible to preserve a portion of the jury's verdict . . . by starting with [it] and cutting it down," because "prejudicial error ha[d] infected the jury's entire consideration" of the case. *Id.* at 50 (citation omitted). The purported error in this case – a belief on the part of the jury that they could award

Riseman a 1998 AMIP bonus payment in excess of the maximum apparently available to him – was, by contrast, easily quantified and addressed by the court of appeals. Thus, unlike the situation faced by the Second Circuit in *Shu-Tao Lin*, the court of appeals plainly was able to "'lop[] off an excrescence'" in the jury's verdict by a particular "quantifiable amount," *viz.*, the amount awarded by the jury in excess of that which was legally available to Riseman under his agreement with petitioners. *Id.* at 49 (quoting *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935)). The lower court's reduction of the legal excess, accordingly, was fully consistent with the Seventh Amendment.

Second Circuit law after *Lin*, moreover, highlights why the Third Circuit's reduction of the award was fully appropriate. In *Earl* v. *Bouchard Transportation Co.*, 917 F.2d 1320 (2d Cir. 1990), that court emphasized that a court's objective in granting a remittitur must be to "minimize the extent of judicial interference with a matter that is otherwise within the jury's domain." *Id.* at 1328. To accomplish this goal and to remain "the most faithful to the jury's verdict," the court admonished, the proper course of a court faced with what it views as an excessive verdict is to "reduce the verdict only to the maximum that would be upheld . . . as not excessive." *Id.*; see *id.* at 1330 (adopting approach). This approach, which best respects the jury's verdict, see *id.* at 1329 (it is more "faithful to the jury's apparent intent"), was plainly followed by the Third Circuit here.

Indeed, *every* circuit to have faced this issue has adopted precisely the same "maximum recovery rule." Thus, the Circuits routinely hold in circumstances similar to those before the court below that "the verdict must be reduced to the maximum amount the jury could properly have awarded." *Caldarera* v. *Eastern Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir. 1983); see also, *e.g.*, *Unisplay, S.A.* v. *American Elec. Sign Co.*, 69 F.3d 512, 519 (Fed. Cir. 1995) ("When calculating an amount to remit, in order to encourage use of

the efficient remittitur option, we will follow the 'maximum recovery rule,' which requires that the determination be based on the highest amount of damages that the jury could properly have awarded based on the relevant evidence."); *Carter* v. *District of Columbia*, 795 F.2d 116, 135 n.13 (D.C. Cir. 1986) ("it is appropriate to set a remittitur so as to permit recovery of the highest amount the jury tolerably could have awarded"); *K-B Trucking Co.* v. *Riss Int'l Corp.*, 763 F.2d 1148, 1162-63 (10th Cir. 1985) ("'[A] remittitur order reducing a jury's award to the outer limit of the proof is the appropriate remedy where the jury's damage award exceeds the amount established by the evidence.'") (alteration in original). There is, in short, simply no conflict in the circuits on this matter.[5]

Not only was the Third Circuit's decision below fully consistent with the decisions of its sister circuits, moreover, it was demonstrably correct.[6] The Third Circuit properly reduced Riseman's WPCL award to "the highest reasonable total of damages for which there is adequate evidentiary support in th[e] case." *Marchant*, 836 F.2d at 704 (remitting award to maximum amount potentially supported by record and offering plaintiff option of accepting remittitur or electing new trial). Further, by following this approach, the court of appeals insured that the "*defendant[s] would not in any way be prejudiced.*" *Id.* (emphasis added). This is because, as

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[5] If anything, the only party who could possibly claim injury flowing from the Third Circuit's decision is *respondent* as, in each of the above-cited decisions, the court of appeals gave the plaintiff – but never the defendant – the option of electing to re-try the damages issues. *See, e.g.*, *Caldarera*, 705 F.2d at 786; *Carter*, 795 F.2d at 135.

[6] Indeed, the cases relied upon by petitioners apply the maximum recovery rule, *see, e.g.*, *Deakle* v. *John E. Graham & Sons*, 756 F.2d 821, 827-28 (11th Cir. 1985) (cited at Pet. 13), and highlight that an appellate remittitur of excessive damages leaves only the plaintiff – if anyone – with the option of a new trial, *see, e.g.*, *Kropp* v. *Ziebarth*, 601 F.2d 1348, 1354-55 (8th Cir. 1979) (cited at Pet. 13).

leading commentators have recognized, a defendant simply "cannot complain of any judgment within the permissible limits." Wright & Miller § 2815, at 167. Advanta's efforts to do so are both wrong and unworthy of this Court's consideration.

3. Unable to identify any decisional conflict among the courts, petitioners are left to argue that the Third Circuit improperly applied the correct legal standard to the peculiar facts of this case. Apart from the fact that such a determination is inappropriate for this Court's attention, see Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."), the record reflects that the court of appeals' application of the law to the particular facts in this case was not only unexceptional but also entirely correct.

Petitioners' argument to the contrary consists of a lengthy recitation of this Court's Seventh Amendment decisions, all of which plainly support the decision below. First, petitioners advance the unremarkable proposition that "[w]here the effect of an error on liability or damage determinations is clearly ascertainable, an appellate court may properly permit the entry of judgment in a correct amount, at least with the consent of the aggrieved party." Pet. 6. With the singular exception of offering a new trial *to respondent*, that is precisely what the Third Circuit did in this case.

Petitioners go on to rely on a series of cases involving prejudicial error that infected the entirety of the jury's consideration of a case. Thus, Advanta relies on *Maryland* v. *Baldwin*, 112 U.S. 490 (1884), a case in which inadmissible testimony was permitted to be heard by the jury and this Court found it "impossible to say what effect [the improper testimony] may have had on the minds of the jury" when deciding the liability question underlying the entire case. *Id.* at 494. Petitioners next cite *Memphis Community School District* v. *Stachura*, 477 U.S. 299 (1986), a case in which this

Court remanded for a new trial because the damages instruction permitted the jury to predicate its general compensatory damages verdict upon two distinct types of damages, one of which was unavailable to the plaintiff. See *id.* at 312-13. Because the consideration of the improper element of damages called into question the entire compensatory damages award, there remained nothing salvageable in that aspect of the jury's verdict. See *id.*

These decisions are entirely inapposite to this case, which does not involve error that undermines the integrity of the jury's verdict and damages award on Riseman's WPCL claim. Rather, the error found by the Third Circuit was that the jury found full liability on the WPCL claim but awarded damages that exceeded the maximum available in light of the record. Such an error is easily quantified and properly addressed by a reviewing court. This is because such an error is no different from a case in which a jury finds full liability but awards damages in excess of a statutory limit, a situation in which reviewing courts routinely reduce the damages accordingly. *Accord Southern Ry.-Carolina Div.* v. *Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.) (observing that where a verdict exceeds the maximum amount allowed per statute, the question posed to a reviewing court is one of law and not of fact); *Deters* v. *Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1273 (10th Cir. 2000) (noting the standard procedure for capping damages under 42 U.S.C. § 1981a: "Section 1981a establishes a regime whereby the jury will set the damages, without reference to the statutory cap. Then, if the damages awarded exceed the relevant limit, the district court shall reduce the amount so that it conforms to the statutory cap.").

Indeed, additional authority relied upon petitioners, *Dimick* v. *Schiedt*, 293 U.S. 474 (1935), underscores the correctness of the decision below. The Court in *Dimick* (a case that actually involved the practice of additur) opined that judicial reduction of a damages award is fully appropriate where, as

here, the court can ascertain the amount of "excess" in the award and "lop[]" it off as "excrescence." *Id.* at 486. Following the Court's guidance in *Dimick*, courts of appeals routinely reduce damages awards in similar cases to the highest amount of damages for which there is support in the record. See, *e.g.*, *Marchant*, 836 F.2d at 704. "The remaining total is a reasonable one which cannot be challenged," because all that the court has done is eliminate what is excess in the award. See *id.* (citing *Dimick*, 293 U.S. at 486).

Finally, petitioners rely upon this Court's recent decision in *Hetzel v. Prince William County*, 523 U.S. 208 (1998) (per curiam), to argue that summary reversal may be appropriate in this case. The instant case, however, has nothing in common with *Hetzel*. *Hetzel* involved a question over the *right of the plaintiff* to a new trial in the face of a reduction in plaintiff's damages on appeal. Specifically, a jury had held in plaintiff's favor on civil rights claims and awarded her $500,000 in damages. The Fourth Circuit directed that the award was grossly excessive in light of the evidence of harm presented by the plaintiff at trial. Accordingly, it set aside the award in favor of an award of $50,000. See *id.* at 209. This Court held only that the court of appeals should have afforded the plaintiff the option of a new trial prior to entering judgment for the reduced damages. Under *Hetzel* and a long line of this Court's Seventh Amendment decisions involving appellate remittiturs, however, the defendant must live with a plaintiff's choice to elect for remitted damages and has no independent right to a new trial. See, *e.g.*, *Hansen* v. *Boyd*, 161 U.S. 397, 411 (1896) (proper course is to offer *plaintiff* choice between remitted amount and new trial); *Northern Pac. R.R.* v. *Herbert*, 116 U.S. 642, 646-47 (1886) (same).

Hetzel is further distinguishable because there the "discretionary decision [to reduce the damages award] necessarily involved a reweighing of the evidence and reassessment of the appropriate amount of damages warranted

by the facts." *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1351 (Fed. Cir.) (describing and distinguishing *Hetzel*), *cert. denied*, __ U.S. __, 122 S. Ct. 580 (2001). By contrast, just as in a recent case before the Federal Circuit, "in the present case, the . . . court did not reweigh any evidence, nor did it exercise its discretion in computing the damages award." *Id.* All that the Third Circuit did was award the maximum damages possible given the evidence presented at trial. In such circumstances, it is not clear that the plaintiff is entitled to a new trial, see *id.* ("because, as a matter of law, the compensatory damages award could not exceed" the reduced amount, "re-presenting this issue to the jury would have been pointless"); it is, however, quite clear that the defendant is not entitled to a new trial. *See, e.g.*, Wright & Miller § 2815, at 159 (where "it is apparent as a matter of law that certain identifiable sums included in the verdict should not have been there" it is appropriate for the court to reduce the amount of damages correspondingly). This is because the error in question is legal – a point with which petitioners do not appear to quarrel. See Pet. 2 ("the court of appeals correctly determined that the jury's damage award exceeded the maximum amount to which the employee could ever have been *legally* entitled.") (emphasis added).

Accordingly, Advanta's endless hypothetical calculations, Pet. 8-9, prove nothing. Indeed, if accepted, their argument would mean that every time a jury awards damages in excess of a statutory cap, for example, a new trial would be warranted. This has never been the law of this or any other court, and such a rule would do serious injury to the Seventh Amendment's respect for the work of a jury. In deference to the jury's award, instead, it is standard practice for courts to reduce damages to the maximum amount supported by the record or permissible as a matter of law. See, *e.g.*, *Deters*, 202 F.3d at 1273 (approving reduction of award to statutory cap); *Westchester Fire Ins. Co.* v. *Hanley*, 284 F.2d 409, 418 (6th Cir. 1960) (concluding that due to required

apportionment of damages, verdict awarded against single defendant must be reduced by dictated amount); see also, *e.g.*, *Kolb* v. *Goldring, Inc.*, 694 F.2d 869, 874-75 (1st Cir. 1982) (concluding that a remitted award for the maximum amount of damages supported by the evidence was appropriate subject to plaintiff's right to a new trial) (cited at Pet. 14 n.8). The Third Circuit's application of these longstanding principles was neither exceptional nor incorrect.

* * * *

This case presents no question worthy of certiorari, and the asserted conflicts of authority that petitioners conjure up are nonexistent. In short, petitioners have failed to identify any conflict between the decision below and the decisions of this Court of or any other court. The Third Circuit's holding with respect to the reduction of respondent's damages on his state law claims is plainly correct, and therefore nothing warrants this Court's intervention.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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